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SAUDAJANA VENTURE SDN BHD

v.

PENTADBIR TANAH DAERAH BARAT DAYA, PULAU PINANG

B

HIGH COURT MALAYA, PULAU PINANG
VARGHESE GEORGE JC
[LAND REFERENCE NO: 15-111-2010]
31 MAY 2011

C

LAND LAW: *Acquisition of land - Reference to court - Claim for increased assessment of compensation - Value of land - Whether fair and reasonable - Whether comparables provided were relevant - Whether applicant discharged burden of proving value of land*

D

The land reference arose from an objection filed by the applicant, as the owner of the land, being dissatisfied with the award of compensation made by the respondent in respect of the land acquired for "Tujuan Awam" under the Land Acquisition Act 1960 ('the Act'). It was the applicant's contention that the sum awarded did not reflect the fair market value of the land at the time of the acquisition. The applicant further contended that the value ought to have been derived from the declared purchase consideration found in a Sale and Purchase Agreement ('the SPA') entered into by the applicant with one Koay Hean Eng for the disposal of the acquired land together with two other contiguous lots belonging to him. The respondent however contended that the award was fair and reasonable. The applicant has now appealed against the decision and the assessment of the assessors on compensation. The issue to be determined was whether the value for the acquired land as derived from the rate available from the declared purchase consideration in the SPA, was a reliable indicator and/or conclusive as to the fair market value of the acquired land on the material date.

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Held (dismissing the reference for increased compensation):

(1) The applicant relied on the value derived from the SPA as the fair market value upon which the compensation should be based. However, based on the facts it was clear that the SPA involving the acquired land as well as the two additional lots was never completed. (para 21)

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(2) The acquired land had not obtained approval for development, whereas the two additional lots included in the SPA had already secured development approval, which was an advantage considered in the overall purchase. Therefore, the rate derived from the overall purchase consideration was not reliable as being the indicative value of the land (para 19).

(3) Further, the application for adjudication of stamp duty for the three Memorandum of Transfers (MOTs), appeared to have been made after the applicant was informed that the land was to be acquired. The alleged declared purchase consideration was also not reflective of the market value of land with similar characteristics similarly positioned in the locality based on the available comparable transaction. Hence the *bona fides* of the SPA/MOTs or the applicant's intention in entering into the said agreement was seriously doubted. (paras 17 & 18)

(4) The burden was on the applicant to show cogent and acceptable grounds why the award sought to be impugned, were inadequate. In view of the inconclusiveness of the matters surrounding the SPA, other comparable transactions should be taken into consideration to determine the fair market value of the acquired land with relevant adjustment. However, the only two comparables relied by the applicant *ie*, the transactions involving Lot 697 and Lot 5827, were not helpful or relevant for that purpose at all. Hence, no acceptable or persuasive grounds were adduced to allow the interference with and enhance the award of compensation made by the respondent in this case. (paras 22-26)

Case(s) referred to:

Ong Yan & Anor v. Collector of Land Revenue, Alor Gajah, Malacca [1985] 1 LNS 105 HC ***(refd)***

Wan Mohamed v. Collector, Kota Bharu [1967] 1 LNS 205 HC ***(dist)***

Legislation referred to:

Land Acquisition Act 1960, ss. 40D(3), 49(1)

For the applicant - M/s Mureli Navaratnam
For the respondent - YB Penasihat Undang-Undang Negeri

Reported by Emm Zehra

A

JUDGMENT

Varghese George JC:

[1] This land reference arose from an objection filed by the applicant, as the landowner of Lots 1396 (GM 872), 1395 (Lot 871) and 3659 (GRN 45122) all in Mukim 12, Daerah Barat Daya, Negeri Pulau Pinang. The applicant was dissatisfied with an Award of Compensation made by the respondent on 28 April 2010 in respect of the acquisition of all of the land comprised in the said lots (hereinafter referred collectively as 'the acquired land') for 'Tujuan Awam' under the Land Acquisition Act 1960 ('the Act'). The material date of the acquisition was 18 June 2009.

[2] The applicant's objection was limited to the adequacy of compensation (see Borang N), namely, that the sum awarded for the value of the acquired land did not reflect the fair market value of the acquired land at the time of the acquisition.

In this regard the applicant's contention essentially was that the alleged market value of the acquired land ought to be at the rate derived from the declared purchase consideration found in a Sale and Purchase Agreement (SPA) entered into by the applicant on 16 July 2008 with one Koay Hean Eng for the disposal of the acquired land together with two other contiguous lots (Lot 7571 and Lot 937) also belonging to the applicant.

[3] The following matters were not in dispute between the parties:

(a) The total area of the land acquired was 46,739.097 square meters (sm) [502,921.41 square foot (sf)];

(b) The rate of land value derived from the purchase consideration declared in the SPA was RM68.00 per sf. (psf);

(c) The assessment of market value by Jabatan Penilaian dan Perkhidmatan Harta (JPPH) for the respondent was at the rate of RM400 per square meters (psm) or RM37.16 psf.;

(d) Notwithstanding (c) above, the respondent had proceeded to base the award of compensation for land value at the rate of RM49 psf;

(e) The acquired land although held under FIRST GRADE TITLE was however subject to planning restrictions as it was within an area designated as "Zon Kegunaan Terhad", where the allowed development (Industry or Building) was not to exceed two storeys in height, in any event;

(f) The acquired land was located in the vicinity of the southern end of the existing Bayan Lepas International Airport and had a common boundary on its west with "Simpanan Lapangan Terbang Bayan Lepas" (Lot 7570);

(g) The location and details of the respective "comparable" transactions relied on by the parties were as set out in the Common Plan of Comparables marked CP in the proceedings.

[4] At the outset of the proceedings counsel for the applicant stated that the fair market value of the acquired land should be RM68 psf (as derived from the SPA) with a 10% adjustment upwards for time, namely for the lapse of time between the date of the SPA and the material date (almost a year). However when it was pointed out that at the enquiry before the respondent, the applicant had restricted their claim for compensation for land value at RM68 psf, it was then conceded that the applicant's claim was limited in any event to a maximum rate of RM68 psf.

[5] After having heard the respective valuers and submissions of counsel for the parties, the court on 17 February 2011 delivered an oral decision. It was as follows:

(a) Section 40D of the Land Registration Act 1960 was read out.

(b) The Assessors are unanimous in their decision on the issue of compensation.

(c) Assessors are of the view that LHDN Stamp Duty Assessment Form – has recorded the valuations as is done normally. It is a matter of practice for item (b) to reflect – what JPPH reports and here where JPPH has a lower valuation – they (JPPH) will recommend the stated consideration as value.

Hence item (b), is not conclusive nor does it in this case – mean that the "balasan" declared by the parties in transaction has been accepted as the fair market value of the subject lands.

(d) The Assessors are also of the view that the consideration stated in the SPA by itself is not conclusive as well as to the fair market value of the subject land.

Other comparables must be taken into consideration in determining what is the fair market value of the subject land on the material date with relevant adjustment made.

(e) The onus is on the Applicant to show from their comparables – that the fair market value of the subject land on the material date was not RM49 psf as awarded.

The Private Valuer Comparable No. 1 (Lot 697) was not in the immediate vicinity of the subject land. Land adjoining or in the vicinity of an existent airport (subject land) has got its own peculiar limitations.

Lot 697 – is observed to be in an orderly planned locality for residential purpose as opposed to the subject land – which is located in a Kampung area.

As regard Lot 5827 – the other comparable of the Applicant's Valuer – it had main road frontage and was located in such better location. It was also a smaller lot.

It did not offer itself, as well, as a good comparable in the context of this acquisition of the subject land.

(f) The Government Valuer, *albeit*, who valued the fair market value of the subject land to be RM37.00 psf on material date – has justified her assessment of value.

However the Respondent (PTD) had made an award at the rate of RM49.00 psf. In conclusion, the Award of the Respondent is sustained as being fair and reasonable in respect of the only 1 issue in this land reference namely, the issue of market value of the subject lands at the material date.

[6] The applicant has now appealed against that decision and the assessment of the assessors on compensation. It is apposite therefore to point out s. 40D(3) of the Act. (Decision of the Court on Compensation) which read as follows:

(3) Any decision made under this section is final and there **shall be no further appeal to a higher court** on the matter.

Reiterating this position in law that a decision of the High Court on compensation is final and not applicable, s. 49(1) of the Act further provides:

> Any person interested, including the Land Administrator and any person or corporation on whose behalf the proceedings were instituted pursuant to s. 3 may appeal from a decision of the Court to the Court of Appeal and to the Federal Court.
>
> Provided that **where the decision comprises an award of compensation there shall be no appeal therefrom.**

Based on the above referred provisions of the Act, there definitely arises a preliminary issue of whether an appeal, as is brought now by the applicant, against the decision of this court on compensation, is justiciable or a competent one at all. Notwithstanding that, the grounds for the decision of the court comprising myself and two assessors are set out below.

Outline Of The Controversy, In Any Event

[7] The main issue in controversy in this reference can be summarised to be whether land value for the acquired land as derived from the rate available from the declared purchase consideration in the SPA, was reliable indicator and/or conclusive as to the fair market value of the acquired land on the material date.

The applicant argued that the rate derived from the purchase consideration in the SPA was the best evidence of market value of acquired land and binding on the respondent in the circumstances of the fact that it was a sale transaction involving the same land.

The respondent on the other hand contended that such derived rate was not reliable at all, basically for the reason that the supposed "sale transaction" was not completed and nor was the "transfer" finally effected into the name of the intended purchaser. Further, the derived rate from the SPA was not consistent with other "transacted" market value available in respect of land sold in vicinity of the acquired land at about the same time. These comparable sale transactions, it was argued, with relevant adjustment for similarities and dissimilarities offered the best indicators of market value in that locality.

A The applicant's counter to the said position of the respondent was that the SPA transaction would have proceeded to conclusion but for the acquisition which intervened in the interim.

Applicant's Case

B **[8]** Apart from the derived rate of RM68 psf from the declared purchase consideration in the SPA, the applicant further stressed that the declared consideration had been accepted by JPPH as the "Nilai Pasaran" and thereby confirming that it was the prevailing market value.

C The applicant in this regard referred to the three pro forma "TAKSIRAN DUTI SETEM PINDAH MILIK HARTANAH", all dated 28 November 2008, issued by Lembaga Hasil Dalam Negeri Malaysia in respect of the three (3) separate Memorandum of D Transfer (MOTs) submitted for adjudication of stamp duty payable on the said MOTs. (Found as part of exh. III of Private Valuer's Report (PV-1).

Counsel for the applicant pointed out that the "Nilai Pasaran E (Tarikh Perjanjian Jual Beli Disetemkan)", which was an assessment made by the JPPH (for the Stamp Duty Department), corresponded with the "Balasan (seperti yang dinyatakan dalam Borang 14A" (Borang 14A being the respective MOT). The duty levied was stated as "Berdasarkan Kepada (a) or (b) mana yang F lebih tinggi".

[9] For a better appreciation of this argument the material part of the pro Forma is set out below:

> Perjanjian Duti Yang dikenakan (Ad-Valorem)
>
> G
>
> Bah A: Pindahmilik Hartanah (Jualan atau "Voluntary Disposition")
>
> (a) Balasan (seperti yang dinyatakan dalam Borang 14A).
> ... (x)
>
> H
>
> (b) Nilai Pasaran (Tarikh Perjanjian Jualbeli disetemkan).
> ... (x)
>
> Duti yang dikenakan yang dikira mengikut Kadar dibawah Butiran 32(a).
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(c) Berdasarkan kepada (a) atau (b) yang yang lebih tinggi. ... (x)

(d) Duti yang dikenakan ke atas (c) ... (y)

It was contended for the applicant that, since item (c) above (Berdasarkan kepada (a) or (b) yang lebih tinggi) and (b) (Nilai Pasaran (Tarikh Perjanjian Jualbeli disetemkan) was recorded as the same as the "Balasan" (consideration), it was tantamount to an acknowledgement by JPPH that market value of the land in question was indeed the declared purchase consideration.

[10] Counsel for the applicant also highlighted the fact that there was no evidence at all led before the court to show that the SPA was not entered 'at arms length' or that it was not a *bona fide* disposal. In the absence of such evidence, it was urged that the declared purchase consideration and the derived rate of market value therefore should prevail and be applied as the fair rate for compensation for land value in this land acquisition as well.

[11] The applicant's valuer (Private Valuer) did also in his report and valuation refer to two other comparable transactions namely, a transaction involving Lot 697 in 22 August 2008 and the other being Lot 5827 transacted in 2006 (the latter a piece of land located in the northern fringes of the airport area).

It was however conceded by the applicant's valuer that Lot 697 although a development land was not in the immediate locality of the acquired land and was not subject to "perumahan terhad" as was the subject land.

As regards Lot 5827 it was pointed out by the Government Valuer that this transaction was not a good comparable considering that Lot 5827 was within an area zoned "industrial" and was not encumbered with the restrictions that the acquired land (adjoining the airport) was subjected to.

Respondent's Case

[12] The Government Valuer, as alluded to earlier, had assessed the fair market value for the acquired land at the rate of RM37.16 psf. She referred to three transactions of land located around the southern area of the Bayan Lepas Airport as relevant comparables and set out her adjustments (Butir dan Penyelerasan) at Lampiran

1-GV1. She maintained this assessment, notwithstanding the respondent's award of compensation for land value ultimately at RM49.02 psf.

[13] It was also the Government Valuer's testimony that in the JPPH's internal assessment of the relevant MOT/SPA in this case for stamp duty purposes, the market value for the lots (5) lots of land which were the subject of the SPA were, RM29.73 psf for Lot 3659 and RM33.45 psf for Lot 1395 and Lot 1995 only.

[14] As regards the respective insertions in the "Taksiran Duti Setem Pindah Milik Hartanah", she said that it was the normal practice to insert the declared purchase consideration as (b), notwithstanding a lower valuation by JPPH of the current market value. This was because the stamp duty was payable on the higher of the two values in any event. (The assessors seemed familiar to this practice).

Court's Assessment

[15] The SPA had, it must be noted, in this case provided for an unusually long 12 month period for completion. There was no discernable reason from the terms of the SPA why the purchaser was granted this long period of time or latitude to complete the transaction, when the usual practice was for the purchaser to complete the purchase within three (3) months unless it was stated to be conditional on relevant "consents" or approvals being obtained.

[16] The MOTs in this case were not stamped within the thirty days of receipt of the Notis Taksiran. The sale and purchase transaction remained uncompleted in the circumstances.

There was also no evidence before the court that the intended purchaser had terminated the SPA pursuant to cls. 8.2 and 8.3 of the SPA.

In any event, it cannot also escape the observation, that in such a proposed sale transaction involving in value RM42.925 million or so, there was no solicitors designated to act for the 'vendors' (the applicant). (See p. 12 of the SPA). Further, the lands which were the subject of the SPA were at that time charged to AmBank (M) Bhd and there was no evidence that the applicant

had moved to obtain a redemption statement to proceed with the sale transaction if it was genuinely intended to proceed with the transaction or disposal.

[17] More significantly however, although SPA was entered into on 16 July 2008, the application for adjudication of stamp duty, as is obvious from the respective "Notis Taksiran" for the three MOTs, were only submitted either on 4 November 2008 or 6 November 2008. See opening lines 'Merujuk kepada permohonan tuan bertarikh …' in the said notices issued on 28 November 2008.

This late submission for adjudication too, it must be stressed appear to have been made after the applicant was informed that the acquired land was to be acquired. See letter from Perbadanan Pembangunan Pulau Pinang dated 5 September 2008 to the applicant exhibited by the applicant's valuer in PV-2 at Lampiran A.

[18] The Assessors and I had serious doubts for the above reasons, as to the *bona fides* of the SPA/MOTs or the applicant's intention in entering into the said agreement for disposal of the five lots of land comprised there. In any event, and more materially, it was the unanimous position of the assessors that the alleged declared purchase consideration was not reflective of the market value of land with similar characteristics similarly positioned in that locality based on the available comparable transaction cited by both the valuers.

[19] It need be also highlighted here that the acquired land (three lots) had not obtained approval for development. The two additional lots included in the SPA and which were not acquired (new Lot 7571 and Lot 937) had already secured development approval. (See same letter dated 5 September 2008 attached as Lampiran A in PV-2). It was not inconceivable therefore that the overall purchase consideration declared in the SPA included this particular advantage that the two lots (not the subject of the acquisition) had. The rate derived from the overall purchase consideration was therefore not reliable to be adopted as being the indicative value of those land.

[20] As regards the Notis Taksiran issued by the LHDN, the assessors were of the view that valuations as were recorded in those notices were as was normally done and item (b) bears out in practice the declared consideration even though the JPPH's valuation indicated a lower market value for the lands in question on the date of the sale agreement.

Accordingly what is recorded in (b) was not conclusive nor did it mean that the "balasan" (consideration) declared by the parties to the disposal transaction had been accepted as the fair market value of the subject land.

[21] As support for the applicant's position that the value derived from the declared purchase consideration found in the SPA was the fair market value upon which the compensation should be awarded, counsel for the applicant had referred to the case of *Wan Mohamed v. Collector, Kota Bharu* [1967] 1 LNS 205. In that case Wan Sulaiman J (as he then was) had observed as follows:

> As was said in the case of *ILP Frenchman v. Assistant Collector, Haveli*, AIR 1922 Bom. 399:
>
> > The sale price of property itself which is under acquisition would be a better guide than a sale of other properties however similar, as the elements of dissimilarity will be least present when the transaction sought to be applied is a previous purchase of the same property which is under acquisition.

However, it needs to be pointed out that in *Wan Mohamed* case, where that proposition found favour, the purchase (sale) of the subject land was done on 13 August 1962 while the gazette notice in respect of the acquisition was dated 16 June 1966, some four years later. In other words there was a duly completed sale and purchase transaction of the said land itself not too far in the distant back to which reference could be had to the purchase consideration there as a starting premise to fix the fair market value of the subject land, there on 16 June 1966, the subsequent acquisition date.

This was not the situation in our instant case. The sale and purchase transaction involving the acquired land and the two additional lots was never completed.

[22] It is trite that in proceedings of this nature, the burden is on the applicants and in this case the applicant's Private Valuer in particular, by means of his valuation report (and reply) filed in court, to show cogent and acceptable grounds why the award of the respondent, now sought to be impugned, were inadequate. (*Ong Yan & Anor v. Collector of Land Revenue, Alor Gajah, Malacca* [1986] 1 MLJ 405). The First Schedule of the Act (Principles Relating To The Determination Of Compensation) in para. 1 (Market Value) in subparagraph (1A) states:

> In assessing the market value of any scheduled land, the valuer may use any suitable method of valuation to arrive at the market value **provided** that regard may be had to the prices paid for the **recent sales of land with similar characteristics** as the scheduled land which are situated **within the vicinity of the scheduled land** and with particular consideration being given to the last transaction on the scheduled land within two years from the date with reference to which the scheduled land is to be assessed under subparagraph (1).

In the Third Schedule to the Act (Evidence and Procedures in Land Reference Cases) at para. 2(1) it is further provided that:

> The Applicant's Valuer's report alone must establish a *prima facie* case for the Applicant.

[23] In the circumstances, of the matters surrounding the SPA or the Notis Taksiran being not conclusive or determinative, the assessors were unanimous that the other comparable transactions should be taken into consideration to determine the fair market value of the acquired land with relevant adjustment made to such comparables to derive the fair market value for the acquired land.

[24] The question then was whether the applicant could, excluding the SPA/MOT, show with the assistance of other "comparable" transaction, what ought to be the fair market value of the acquired land on the material date.

The assessors were of the unanimous view that the only two comparables relied on by the applicant's Private Valuer namely transactions involving Lot 697 and Lot 5827, were not helpful or relevant for that purposes at all.

[25] The Private Valuer himself conceded that Lot 697 (Comparable 1) was not located in the immediate vicinity or locality of the acquired land. It was located in an area where there was already existant residential development in a planned manner.

[26] As regards Lot 5827, as it was pointed out earlier, it was within an area zoned for "industrial" development and was located in a better location with main road frontage when compared to therefore was bound further to attract a higher price in comparison to the acquired land.

Conclusion

[27] For the reasons aforesaid, the assessors were not persuaded that there were any acceptable or persuasive grounds to interfere with and enhance the award of compensation made by the respondent in this case.

[28] The issue that was before the court for determination was, in the final analysis nothing more than a simple issue as to fair "compensation" to be awarded for the market value of the acquired land. As the assessors were unanimous that it was not higher than the rate of RM49 psf as awarded by the respondent, the applicant's reference seeking an increased compensation was dismissed and the following consequential orders issued:

1. The applicant was to pay:

   (a) the Assessor from Private Valuers List the sum of RM500 or a Assessor's Fee and RM300 as travelling costs; and

   (h) the Assessor from the Government Valuers list the sum of RM500 as Assessor's Fees.

2. The deposit was to be forfeited as costs to respondent.